

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF ON BEHALF OF APPELLEE

947

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1948

No. 9867

CIBERTO RUDOLPH CAMPBELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

GEORGE MORRIS FAY,
United States Attorney.

ARTHUR J. MCLAUGHLIN,
Assistant United States Attorney.

JOSEPH M. HOWARD,
Assistant United States Attorney.

RICHARD M. ROBERTS,
Assistant United States Attorney.

*United States Court of Appeal
for the District of Columbia
Circuit*

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Joseph W. Stewart

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*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF CASE

On March 25, 1948 appellant pleaded not guilty on an indictment containing two counts. On May 3, 1948 a jury found him guilty on both counts—assault with intent to commit carnal knowledge on Inez M. C. Miller and simple assault on Yvonne Johnson.

A motion for new trial was argued and overruled. Appellant was sentenced to a term of five to fifteen years.

Inez Miller was called as the first witness for the Government (A. 5).^{*} She testified that she was fourteen years old and attended Garnett Patterson Junior High School and Simpson Memorial Sunday school. No objection was made by appellant as to her competency to testify. She stated

^{*} Refers to Appendix pages.

that on the evening of July 25, 1947 she and a group of boys and girls went to the Howard University grounds around six-thirty. The witness stated that they played hide and seek a while and that finally she and Yvonne Johnson were left alone about nine-thirty or ten o'clock on the grounds of the University. At that time she stated the defendant turned a flashlight on them and told them he was a detective from Number Thirteen. She testified that then he took Yvonne by the hand and put his hand up in her privates and then Yvonne started to holler and the defendant put his finger up her, the witness's privates and she started hollering. The witness further stated that the defendant then told Yvonne to go get the boys they had been with or he would take them to Number Thirteen and report them. She said Yvonne left and the defendant took her hand and took her up by the clock and told her to lay down and told her to pull down her pants which she did because she was scared. She further stated that he then unbuttoned his pants and took out his private. At that time she said she jumped up and eased away towards the steps and started running. She said she saw Yvonne seated on the curb and grabbed her hand and went to Yvonne's house and started telling her mother what happened and then she went home. She stated she told her mother what happened. The witness then testified that her mother had had a baby just before the trial started and that she was still in bed. She further stated that she had identified defendant's picture from six or seven pictures as the one of the man who had done the above things to her on the night of July 25.

Yvonne Johnson was next called to testify for the Government (A. 7). She stated that she went to Mott School and was in grade Four-B. She further testified that she was eleven years old. No objection was made by appellant as to her competency to testify. She testified that she and Inez Miller and some other children were at Howard University on the evening of July 25, 1947 and were playing hide and go seek. The witness further stated that she and Inez were together when the defendant came up and put a light on them. She testified that he said he was a

policeman. She said there were some questions by defendant about what the girls and the boys had been doing and that then he put his finger up her dress and then he put his finger up Inez's dress. She stated he then told her to go and find the boys. She said she tried to find the boys and couldn't and sat on a curb and suddenly Inez came running and told her the man had tried to rape her. She said the ball game at Griffith Stadium was letting out when this happened. She further stated she ran home and told her mother. She said the next time she saw the defendant was the next day or so when she saw his picture among seven the police showed her. She further stated that she later saw the defendant in a group of men at Police Headquarters.

The next witness to be called by the Government was Mrs. Beatrice Johnson, mother of Yvonne Johnson (A. 9). She testified that on the evening of July 25, 1947 her daughter and Inez Miller came running home around ten o'clock and that they were excited. She further testified that Inez told her they had been playing hide and seek on the campus ground and a man came up and asked them what they were doing and told them he was a detective. She further testified that Yvonne then said he had taken his finger and stuck it up her privates and did the same thing to Inez. She stated she told them they had no business on the campus and told Inez to go home and put Yvonne to bed.

Robert Coleman was the next witness called by the Government (A. 11). He testified that during the month of July, 1947 he was employed at Howard University as a special officer. He testified that on the evening of July 25, 1947 he and special officer Hilliard Lewis had punched the clock behind the gym between eleven-thirty and twelve P. M. when the defendant came up and threw a flashlight on him. He said he questioned the defendant and defendant told him he was going home from a ball game and was using the flashlight to see his way home. The defendant was told to go on about his business and the witness said he didn't see him again until July 29, 1947. He further stated that on the morning of July 26 some police officers talked to him about something that had happened the even-

ing before and defendant's name was mentioned. The witness then testified that he later saw the defendant about eleven-thirty in the evening on July 29, 1947 as he came out of the men's rest room in Minor Hall. He further said he told the defendant he had been looking for him since Friday night (July 25, 1947) and asked him if he remembered being on the campus that night and defendant admitted being on the campus. He said he placed the defendant under arrest as a suspect. He further testified he took him to the switchboard room where he told him he was under arrest for attempting rape on two girls behind the library. The witness further stated that he turned his head and as he did so the defendant struck him and ran out of the building. He further stated he pursued him across the street and fired one shot in the air to make defendant stop and when he didn't he fired another one. He further said the defendant slowed up and he, the witness, caught him and found out that the second shot had taken effect. A passing car was stopped and defendant was taken to Freedman's Hospital. The witness also stated defendant had a flashlight with him the night he was arrested which was taken away from him.

David Ennis was called as the next Government witness and testified that during the month of July, 1947 he was a member of the Metropolitan Police assigned to the Sex Squad, (A. 13). He testified he talked to Inez Miller, her mother, and Yvonne Johnson about one o'clock the morning of July 26, 1947 and then talked to a guard at Howard University about two-thirty or three o'clock the same morning. The witness further testified that he talked with defendant at Freedman's Hospital the morning of July 30, 1947. He stated that the defendant told him he had been on the grounds of Howard University the evening of July 25th on his way home from a ball game and had seen two young girls there at that time and had remarked to them that it was late for them to be out. He denied doing anything to the two girls.

Hilliard Augustus Lewis was called as a Government witness and testified that during July of 1947 he was employed

as a special policeman for Howard University (A. 14). The witness further testified that on the night of July 25, 1947 he was with Officer Coleman between eleven-thirty and twelve in the evening when they saw the defendant behind the gym. He stated Coleman asked him what he was doing and the defendant stated he was going home. He further said that after Coleman had questioned the defendant he told him to leave the campus and he left. The witness stated that he next saw the defendant on July 29, 1947 in Minor Hall when Coleman was questioning him at the switchboard. He further stated he went to the bathroom and while there heard a commotion and came out and Coleman was getting up off the floor and the door was closing. He stated he followed Coleman out by about four or five paces and Coleman fired two shots after calling to the defendant to halt. He said the defendant slowed up after the second shot and they caught him and found he had been hit. A car was stopped and defendant was taken to the hospital.

Alex K. Kapsol was called as a Government witness and testified that during July, 1947 he was a member of the Metropolitan Police assigned to the Sex Squad (R. 179). He testified he saw Inez Miller and Yvonne Johnson on the evening of February 27th, 1948 at their houses. He said he showed each of them seven pictures of the defendant. He further said that on March 7th, 1948 about one-thirty in the afternoon a line-up was arranged of seven men including the defendant. He further testified that each of the two girls, Inez Miller and Yvonne Johnson picked the defendant out of the line-up as the man who had molested them. He further testified that defendant was confronted by the two girls and they told what he had done to them.

James F. Sartain was called as the Government's next witness and testified that he was a member of the Metropolitan Police assigned to the Sex Squad, (R. 192). He stated he was present at the line-up on March 7, 1948 when Inez Miller and Yvonne Johnson picked out the defendant as the man who had assaulted them. He further testified that appellant's attorney was present and picked the men for the line-up.

The flashlight was received into evidence and the Government rested (R. 195).

Simon Harvin was called as a witness for the defense (A. 17). He testified he saw the defendant at the ball park on July 25, 1947. He said he first saw the defendant between a quarter of six and six thirty. He further stated he didn't know what time the defendant had left the ball park the evening of July 25th.

Ciberto Rudolph Campbell took the witness stand in his own defense, (A. 18). He testified that on the evening of July 25, 1947 he was at the ball game at Griffith Stadium after spending all day at the office of James J. Laughlin, his attorney. He said that after the game he went south on Georgia Avenue and Seventh Street to "T" Street and over to French Street where he ate dinner. He further stated he did not go through Howard University grounds on July 25, 1947 after leaving the ball park (A. 18). He stated that on the evening of July 29, 1947 he was at the ball game at Griffith Stadium again and on his way home he stopped in Minor Hall at Howard University to get a drink of water. He further said that while there he was accosted by Officer Coleman who said he had been looking for him. He testified that he had had trouble with the Metropolitan Police before and he demanded to see the Dean at Howard University—he having been a student—rather than be turned over to the police. He stated Coleman denied this request and that he started to go to get the Dean and as he left the building he was shot. The appellant denied striking Coleman. He also denied telling Officer Ennis that he had seen two girls at Howard University the night of July 25, 1947. On cross-examination appellant admitted he had previously been convicted of petit larceny in Municipal Court of the District of Columbia. Appellant objected to the question on the grounds the conviction was on appeal. The court overruled the objection.

Joseph R. Durham was called as a witness for the defense (R. 403). He testified he couldn't remember the evening of July 25, 1947 but did remember seeing Cleveland play at the ball park the night that the first negro

ballplayer played there. (This indicated it was July 25, 1947 as appellant had testified that that date was the first night a negro ballplayer had played in Washington.) He testified he saw appellant at the ball game and that he stayed there the whole game and they left at the same time.

The above witness testified after the discussion of prayers and after the opening argument of the Government.

The court granted all of appellant's prayers except Number Three which was denied and Number Five which was modified. Defendant's prayer Number Three was as follows:

"The jury are instructed that in this case the defendant is charged with an attempt to commit carnal knowledge on a child of tender years, and in this connection you are instructed that an allegation of this kind is an accusation easily to be made and hard to disprove, but harder still to defend against, though the defendant be ever so innocent."

Appellant's prayer Number Five read as follows:

"The jury are instructed that the testimony in the main in this case comes from the lips of two children of tender years, and you are instructed that their testimony must be received with care and caution."

The court in its charge to the jury said:

"You are further instructed, ladies and gentlemen of the jury, that the testimony in the main in this case comes from the lips of two children of tender years, and you are instructed that you may take the ages of the complaining witnesses—that is Inez Miller of thirteen at the time the crime was committed, and Yvonne Johnson I believe to be eleven—you may take their ages into consideration in determining how much weight you are going to give the testimony (A. 19)."

STATUTE INVOLVED

31 Stat. 1321 (1901), 22 D. C. Code, Sec. 501 (1940):

Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring,

or cistern of water, shall be sentenced to imprisonment for not more than fifteen years.

31 Stat. 1322 (1901), 22 D. C. Code, Sec. 504 (1940) :

Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both.

SUMMARY OF ARGUMENT

I

Even though a conviction is now on appeal there is a final conviction and the conviction may be used to test the credibility of a witness.

II

Generally there is no degree of competency of witnesses and merely because the complainant and another witness are children is no reason for the court to grant an instruction that their testimony must be received with care and caution.

III

In a prosecution for attempt to commit carnal knowledge, where there is corroboration of prosecutrix's statement, there is no requirement that the court instruct the jury that an allegation of attempt to commit carnal knowledge is easy to make, hard to disprove, and harder still to defend against though the defendant be ever so innocent.

ARGUMENT

I

Noting of Appeal Does Not Affect a Conviction

Appellant urges that the lower court erred when it allowed the prosecutor to ask appellant if he was the same person who had been convicted for petit larceny in Municipal Court for the District of Columbia when an appeal was pending from that conviction. (Br. 5). A search

of the records by appellee had failed to disclose any case in point in this jurisdiction. Section 305, Title 14 of the D. C. Code provides:

“No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, that such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him shall not be concluded by his answer as to such matters. In order to prove such conviction of crime it shall not be necessary to produce the whole record of the proceedings containing such convictions, but the certificate, under seal, of the Clerk of the court wherein such proceedings were had, stating the fact of the conviction and for what cause, shall be sufficient. (Mar. 3, 1901, 31 Stat. 1357, ch. 854 § 1067; June 30, 1902, 32 Stat. 540, ch. 1329).”

In *Murray v. United States*, 52 App. D.C. 119, 288 Fed. 1008, (1923), this court held that the word “crime” included both felonies and misdemeanors. See also *Bostic v. United States*, 68 App. D.C. 167, 94 F. (2d) 63 (1937).

In *Crawford v. United States*, 59 App. D.C. 356, 41 F. (2d) 979 (1930), this court ruled that to have a “conviction” under the code there must be a judgment and sentence as well as a plea or verdict of guilty.

In the case in the Municipal Court, which the prosecutor asked appellant about, there had been a verdict of guilty plus a judgment and sentence. Therefore, the requirements set forth in the Crawford case, *supra*, have been met with and there is a conviction in the Municipal Court case. The question then presented is, does the fact an appeal has been noted do away with either the verdict of guilty or the judgment and sentence? The government submits that the noting of an appeal does neither. In *Viberg v. State*, 138 Ala. 100, 35 So. 53 (1903), the prosecutor was allowed to cross-examine a defendant on a conviction which at the time was under appeal. By statute in Alabama where appeal is

noted the judgment must be rendered, but execution is suspended. In this case the court said:

“These statutes go no further than indicated above. They simply provide that, upon its being made known to the court that the defendant desires to take an appeal, ‘judgment must be rendered on the conviction, but the execution thereof must be suspended pending the appeal’. They do not in any wise interfere with the finality of the judgment or its validity. Nor do they make its finality dependent upon an affirmance or a reversal by this court. Their effect is to prevent the enforcement or execution of the judgment while the appeal is pending, and this clearly marks the limit of their operation. Our conclusion is that the judgment of conviction remained in full force and effect, in so far as it was an adjudication of the guilt of the defendant, for the purpose for which it was offered in evidence.”

In *Haebett v. Freeman*, 103 Iowa 296, 72 N.W. 528 (1897), the court said:

“The appeal, when taken, does not affect the judgment, unless the bail be put in, and when that is done the effect of the bail is to stay the execution of the judgment. Code 1873. Id. § 4528. This court does not try the case anew, but it may affirm, reverse, or modify the judgment, and render such judgment as the district court should have rendered, and may, if necessary or proper order a new trial. Id. § 4538. If this court render a judgment of affirmance, the original judgment is to be executed as this court shall direct. Id. § 4541. Hence, until the judgment of the district court is modified or reversed, it continues in force, although the right to execute it may be suspended. * * * The judgment is not otherwise affected, however, before it is reversed or modified by this court. Until that time the conviction stands, and may be shown as bearing on the credibility of the person convicted, when he testifies as a witness.”

In *State v. Crawford*, 60 Utah 6, 206 Pac. 717 (1922) the court said:

“The weight of authority supports the rule, as stated in 40 Cyc. 2611:

‘The pendency of an appeal from a conviction of crime does not preclude the showing of such conviction as bearing on the credibility as a witness of the person convicted’.”

See also *Latikos v. State*, 17 Ala. App. 655, 88 So. 47 (1921); *Ritter v. The Democratic Press Co.*, 68 Mo. 458 (—); *People v. Rogers*, 112 Cal. App. 615, 297 Pac. 924 (1931); *Manning v. State*, 7 Okla. Cr. 367, 123 Pac. 1029 (1912).

Many of the cases cited by appellant to support his argument do not actually support it. In *Commonwealth v. Danton*, 243 Mass. 552, 137 N.E. 652 (1923) cited by appellant (Br. 10) there had been a conviction, an appeal setting aside the conviction and then the charge was nolle prossed. The court ruled that after this the conviction could not be used to impeach. It should be noted that in that case the appeal had been heard and the conviction reversed. That is not true in the case before the court. The case of *Card v. Foot*, 57 Conn. 427, 18 Atl. 713 (1889) cited by appellant (Br. 10) is another case in which the conviction had been appealed and the charge then nolle prossed. In the case of *Benedict v. State*, 190 Wisc. 266, 208 N.W. 934 (1926), cited by appellant (Br. 11) the conviction had been set aside. In *Duffy v. State*, 151 Md. 456, 135 Atl. 189 (1926), cited by appellant (Br. 11) there had merely been an arrest and no conviction at all.

In *State v. Duplechain*, 52 La. Ann. 448; 26 So. 1000 (1899) cited by appellant (Br. 11) there had been a conviction, an appeal which set aside the conviction and then a nolle pross of the charge. In this case the court said that on redirect examination the fact that the conviction was reversed may be brought out to rehabilitate the witness. The court did not say that it was reversible error for the conviction to be shown even though it had been reversed. See also *Fomby v. Williams*, 17 Ala. App. 24, 81 So. 360 (1919) cited by appellant. (Br. 11).

It is submitted that the noting of an appeal does not set aside either the verdict of guilty or the judgment and sentence. Surely, appellant, who has served seven months

of his sentence, would not say that this appeal has set aside either the verdict of guilty or the judgment and sentence, or in any way abated them. It should follow that the term "conviction" as used in Section 305 Title 14 D.C. Code, *supra*, and as defined in the Crawford case, *supra*, was fully covered in the conviction of appellant in the Municipal Court and use of it by the prosecutor in the lower court here was not error.

II

Court Did Not Err in Denying Instruction That Testimony of Children Must Be Received With Care and Caution

Appellant urges that the trial court committed error in refusing the following instruction:

"The jury are instructed that the testimony in the main in this case comes from the lips of two children of tender years, and you are instructed that their testimony must be received with care and caution."

In support of this contention, he cites one case, *Cheeseman v. Cheeseman*, 99 Cal. App. 290, 278 Pac. 242 (1929) (Br. 12). This case was tried before a judge without a jury. The appellate court in that case said:

"While the evidence of a child of such tender years should be accepted with great caution, the policy of the law no longer fixes a minimum age at which it will be received."

Later the court said:

"Ordinarily the weight and sufficiency of testimony must be left with the trial judge. We see no reason for departing from that rule in the present case."

Appellee has been unable to locate in either citation the language quoted by appellant (Br. 12). It submits that the words used by the appellate court dealt with the receiving of the testimony and not with the effect to be given it once the lower court has ruled that it is admissible.

In the case of *Beausoliel v. United States*, 71 App. D.C. 111, 107 F. 2d 292 (1939) this court said:

"The competency of a child to testify is a matter within the discretion of the trial court which will not

be disturbed unless error is clearly manifest. The applicable rule was stated by the Supreme Court in *Wheeler v. United States*:

'While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities'. 159 U.S. 523, 524, 525, 16 S. Ct. 93, 40 L. Ed. 244. See also, *Williams v. United States*, 3 App. D.C. 335, 340; *Alford v. State*, 182 Ark. 1184, 34 S.W. 2d 224; *Davis v. Commonwealth*, 161 Va. 1037, 171 S.E. 598; *People v. Karpovich*, 288 Ill. 268, 271, 123 N.E. 324, 325."

From the above the government submits that if the trial court permits a child to testify he is as competent as any other witness. Nothing can be found to indicate any holdings which say there is any distinction between competent witnesses. It would, therefore, follow that unless the trial judge abused his discretion in allowing the two girls to testify then their testimony should be given as much credence as any other witness regardless of age. Appellant makes no claim that the trial judge abused his discretion when he allowed the two girls to testify and it is submitted the record shows no abuse of discretion. In fact, the record discloses the trial judge was more than fair to appellant when he instructed the jury as quoted in appellant's brief (Br. 12).

III

Court Did Not Commit Error in Denying Instruction That Charge Was Easy to Bring, Hard to Disprove and Harder to Defend Against

Appellant urges that the lower court committed error when it refused the following instructions:

“The jury are instructed that in this case the defendant is charged with an attempt to commit carnal knowledge on a child of tender years, and in this connection you are instructed that an allegation of this kind is an accusation easily to be made and hard to disprove, but harder still to defend against, though the defendant be ever so innocent.”

The weight of authority is to the effect that no such charge is necessary in a rape case, 52 C.J. 1122. Appellee has found only three jurisdictions which have held that it is the duty of the court to give a cautionary charge and those jurisdictions are Porto Rico, Wisconsin and Nebraska.

In the cases where the requested instruction was granted the law required that the prosecutrix resist to the end and the evidence of this resistance was not very conclusive. In this regard it should be kept in mind that the instant case is not a prosecution for rape, but one for attempted carnal knowledge. Contrary to the cases where the courts have said a cautionary instruction should be given, there was ample corroborative evidence in the case before the court.

Some jurisdictions have ruled that a cautionary charge is discretionary with the court and a refusal to grant it will not be grounds for reversal. *State v. Lightheart*, 153 Minn. 40, 189 N.S. 408 (1922); *Watkins v. State*, 134 Miss. 211, 98 S. 537 (1923).

While there is no clear ruling on the point in this jurisdiction the government submits that in a case like the instant case where the charge is attempted carnal knowledge and not rape and where there is evidence in corroboration of prosecutrix's story, it is not error for the court to refuse the charge requested by the appellant. In the present case, there was one witness who was there when appellant first approached the complainant. She testified that appellant

put his finger on her privates and the privates of the complaining witness. (A. 8, 9). Immediately after the occurrence is alleged to have taken place the appellant was seen in the same locality which was not open to the public. (R. 112). Appellant first told officers he was at the scene the evening of the occurrence. (A. 13, 14). On the witness stand he denied he was at the scene (A. 18). This is not a case where only the complaining witness places him at the scene and says he made advances towards her. The trial judge did instruct the jury that they could take into account the ages of the two girls in determining the credibility it would place upon their testimony. (A. 19). Appellant argued to the jury the proposition that the charge was easy to bring and hard to disprove no matter how innocent the defendant. (A. 19). Under the circumstances of this case the government submits the trial court did not err in denying appellant's requested prayer.

Conclusion

For the foregoing reasons, it is respectfully submitted that the judgment of the court below was proper and should be affirmed.

GEORGE MORRIS FAY,
United States Attorney,
 ARTHUR J. McLAUGHLIN,
Assistant United States Attorney,
 JOSEPH M. HOWARD,
Assistant United States Attorney,
 RICHARD M. ROBERTS,
Assistant United States Attorney.